

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 10

IN THE MATTER OF: GRANT	)	
WAREHOUSE SUPERFUND SITE	)	
	)	CERCLA-10-2004-0022
	)	
UNDER THE AUTHORITY OF THE	)	AGREEMENT WITH AND COVENANT
COMPREHENSIVE ENVIRONMENTAL	)	NOT TO SUE PORTLAND
RESPONSE, COMPENSATION, AND	)	DEVELOPMENT COMMISSION
LIABILITY ACT OF 1980, 42 U.S.C.	)	
§ 9601, <u>et seq.</u> , as amended.	)	
	)	

I. INTRODUCTION

This Agreement and Covenant Not to Sue (“Agreement”) is entered into by the United States on behalf of the Environmental Protection Agency (“EPA”) and the Portland Development Commission (“Prospective Purchaser”) (collectively the “Parties”).

This Agreement is entered into pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (“CERCLA”), 42 U.S.C. § 9601, et seq., and the authority of the Attorney General of the United States to compromise and settle claims of the United States.

This Agreement relates to the Portland Development Commission’s purchase of the Grant Warehouse Superfund Site, located in Portland, Oregon, from Erwin Grant, through his conservator, Ken Grant. Pursuant to a separate consent decree between the United States and Erwin Grant, the United States will be entitled to receive funds generated by the purchase as compensation for the costs it incurred in performing the Removal Action at the Grant Warehouse.

The Parties agree to undertake all actions required by the terms and conditions of this

Agreement. The purpose of this Agreement is to settle and resolve, subject to reservations and limitations contained in Sections IX, X, and XII, the potential liability of Prospective Purchaser for the Existing Contamination at the Property that could otherwise result from Prospective Purchaser becoming the owner of the Property.

The Parties agree that Prospective Purchaser's entry into this Agreement, and the actions undertaken by Prospective Purchaser in accordance with the Agreement, do not constitute an admission of any liability by Prospective Purchaser.

The resolution of this potential liability, in exchange for provision by Prospective Purchaser to EPA of a substantial benefit, is in the public interest.

## II. DEFINITIONS

Unless otherwise expressly provided herein, terms used in this Agreement that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations, including any amendments thereto.

1. "EPA" means the United States Environmental Protection Agency and any successor departments or agencies of the United States.

2. "EPA Hazardous Substance Superfund" means the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

3. "Existing Contamination" means any hazardous substances, pollutants, or contaminants present on or existing under the Property as of the effective date of this Agreement.

4. "Parties" means the United States on behalf of EPA, and Prospective Purchaser.

5. "Property" means the real property located at 3368 NE Martin Luther King, Jr. Blvd., Portland, Oregon, also known as the Grant Warehouse Superfund Site, and consisting of Lots 29,

30, and 31 in Block 13, Albina, City of Portland, as depicted generally on the map attached as Exhibit 2.

6. “Response Action” means the removal action performed by EPA at the Property in 1998 and 1999.

7. “Prospective Purchaser” means the Portland Development Commission.

8. “Settling Owner” means Erwin Grant, acting through his conservator, Ken Grant.

9. “United States” means the United States of America, its departments, agencies, and instrumentalities.

### III. STATEMENT OF FACTS

10. As of 1998, hazardous substances including lead, cadmium, chromium, potassium cyanide, sodium cyanide, mercury, nitric acid, oxalic acid, and hydrochloric acid were present at the Property.

11. Between approximately November 18, 1998 and February 19, 1999, EPA conducted the Response Action at the Property. Some hazardous substances may remain at the Property. The United States has incurred approximately \$1,400,000 in costs in connection with the Response Action.

12. On November 2, 2000, the United States filed a complaint pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, in the United States District Court for the District of Oregon against Erwin Grant personally and the Property in rem to recover the costs the United States had incurred in connection with the Response Action. On December 20, 2002, the Court dismissed Erwin Grant from the case based on his apparent incompetence, but allowed the case to continue against the Property in rem. On October 16, 2003, the Court granted the United States’ motion

for summary judgment to recover \$469,312.08 of its costs from the Property. Mr. Grant has provided information to the United States indicating that the warehouse was his personal residence and that Mr. Grant has no assets other than a small amount of Social Security benefits and the fair market value of the warehouse itself.

13. Prospective Purchaser represents, and for the purposes of this Agreement EPA relies on those representations, that Prospective Purchaser's involvement with the Property has been limited to performing an environmental audit there.

#### IV. PURCHASE OF PROPERTY FROM SETTLING OWNER

14. In consideration of and in exchange for the United States' Covenant Not to Sue in Section VIII herein and Release of Lien in Section XX herein, Prospective Purchaser agrees to purchase the Property from Settling Owner for at least \$88,500. The sale agreement between the Prospective Purchaser and the Settling Owner shall provide that upon closing, the escrow holder identified in the sale agreement shall deposit \$88,500 of the escrow deposit created by the sale into the U.S. EPA Hazardous Substance Superfund; that the Escrow Holder shall make the payment by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with current EFT procedures provided by the Financial Litigation Unit, U.S. District Court for the District Of Oregon, referencing the name and address of the Settling Owner, the USAO Number 2000V00884, the U.S. EPA Region and Site Spill ID Number 105Z, and the DOJ Case Number 90-11-3-06611/1; and that the Escrow Holder shall notify U.S. EPA and DOJ, in accordance with the procedure set forth in Section XII (Notices and Submissions), that the payment has been made. The sale shall close by January 30, 2004.

## V. NOTICE TO SUCCESSORS IN INTEREST

15. Within 15 days after the effective date of this Agreement, Prospective Purchaser shall submit to EPA for review and approval a notice to be filed with the Recorder's Office, Multnomah County, State of Oregon, which shall provide notice to all successors-in-title that EPA performed the Response Action at the Property between November 1998 and February 1999. Such notice shall also identify the action filed against the Property in the United States District Court for the District of Oregon, the name and civil action number of the case, and the date on which the Consent Decree settling the action was entered by the Court. Prospective Purchaser shall record the notice within 10 days of EPA's approval of the notice. Prospective Purchaser shall provide EPA with a certified copy of the recorded notice within 10 days of recording such notice.

16. The Prospective Purchaser shall ensure that a copy of this Agreement is provided to any current lessee or sublessee on the Property as of the effective date of this Agreement and shall ensure that any subsequent leases, subleases, assignments, or transfers of the Property or an interest in the Property are consistent with this Section, and Section XI (Parties Bound/Transfer of Covenant).

## VI. DUE CARE/COOPERATION

17. Prospective Purchaser shall exercise due care at the Property with respect to the Existing Contamination and shall comply with all applicable local, State, and federal laws and regulations. In the event Prospective Purchaser becomes aware of any action or occurrence that causes or threatens a release of hazardous substances, pollutants, or contaminants at or from the Property that constitutes an emergency situation or may present an immediate threat to public

health or welfare or the environment, Prospective Purchaser shall immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall, in addition to complying with any applicable notification requirements under Section 103 of CERCLA, 42 U.S.C. § 9603, or any other law, immediately notify EPA of such release or threatened release.

## VII. CERTIFICATION

18. By entering into this agreement, Prospective Purchaser certifies that to the best of its knowledge and belief it has fully and accurately disclosed to EPA all information known to Prospective Purchaser and all information in the possession or control of its officers, directors, employees, contractors, and agents that relates to any Existing Contamination or any past or potential future release of hazardous substances, pollutants, or contaminants at or from the Property and to its qualification for this Agreement. Prospective Purchaser also certifies that to the best of its knowledge and belief it has not caused or contributed to a release or threat of release of hazardous substances, pollutants, or contaminants at the Property. If the United States determines that information provided by Prospective Purchaser is not materially accurate and complete, the Agreement, within the sole discretion of the United States, shall be null and void and the United States reserves all rights it may have.

## VIII. UNITED STATES' COVENANT NOT TO SUE

19. Subject to the Reservation of Rights in Section IX of this Agreement, upon payment of the amount specified in Section IV (Purchase of Property From Settling Owner) of this Agreement to the U.S. EPA Hazardous Substance Superfund, the United States covenants not to sue or take any other civil or administrative action against Prospective Purchaser for civil liability

for injunctive relief or reimbursement of the United States' response costs pursuant to Sections 106 or 107(a) of CERCLA, 42 U.S.C. §§ 9606 or 9607(a) with respect to Existing Contamination.

#### IX. RESERVATION OF RIGHTS

20. The covenant not to sue set forth in Section VIII (United States' Covenant Not to Sue) above does not pertain to any matters other than those expressly specified in Section VIII. The United States reserves, and the Agreement is without prejudice to, all rights against Prospective Purchaser with respect to all other matters, including but not limited to the following:

(a) claims based on a failure by Prospective Purchaser to meet a requirement of this Agreement, including but not limited to Section IV (Purchase of Property from Settling Owner), Section V (Notice to Successors in Interest), Section VI (Due Care/Cooperation), and Section XIV (Payment of Costs);

(b) any liability resulting from past or future releases of hazardous substances, pollutants, or contaminants at or from the Property caused or contributed to by Prospective Purchaser, its successors, assignees, lessees, or sublessees;

(c) any liability resulting from exacerbation of Existing Contamination by Prospective Purchaser, its successors, assignees, lessees, or sublessees;

(d) any liability resulting from the release or threat of release of hazardous substances, pollutants, or contaminants at the Property after the effective date of this Agreement, not within the definition of Existing Contamination;

(e) criminal liability;

(f) liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessment incurred by federal agencies other than EPA;

and

(g) liability for violations of local, State, or federal law or regulations.

21. With respect to any claim or cause of action asserted by the United States, Prospective Purchaser shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to Existing Contamination.

22. Nothing in this Agreement is intended as a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States may have against any person, firm, corporation, or other entity not a party to this Agreement.

23. Nothing in this Agreement is intended to limit the right of EPA to undertake future response actions at the Property or to seek to compel parties other than Prospective Purchaser to perform or pay for response actions at the Property. Nothing in this Agreement shall in any way limit the nature or scope of response actions which may be taken or be required by EPA in exercising its authority under federal law. Prospective Purchaser acknowledges that it is purchasing Property where response actions may be required.

#### X. PROSPECTIVE PURCHASER'S COVENANT NOT TO SUE

24. In consideration of the United States' Covenant Not To Sue in Section VIII of this Agreement, Prospective Purchaser hereby covenants not to sue and not to assert any claims or causes of action against the United States, its authorized officers, employees, or representatives with respect to the Property or this Agreement, including but not limited to, any direct or indirect claims for reimbursement from the Hazardous Substances Superfund established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507, through CERCLA Sections 106(b)(2), 111, 112, 113,



or any other provision of law, any claim against the United States, including any department, agency, or instrumentality of the United States under CERCLA Sections 107 or 113, 42 U.S.C. §§ 9607 or 9613, related to the Property, or any claims arising out of response activities at the Property, including claims based on EPA's oversight of such activities or approval of plans for such activities.

25. Prospective Purchaser reserves, and this Agreement is without prejudice to, actions against the United States based on negligent actions taken directly by the United States, not including oversight or approval of Prospective Purchaser's plans or activities, that are brought pursuant to any statute other than CERCLA or RCRA and for which the waiver of sovereign immunity is found in a statute other than CERCLA or RCRA. Nothing herein shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

#### XI. PARTIES BOUND/TRANSFER OF COVENANT

26. This Agreement shall apply to and be binding upon the United States, and shall apply to and be binding upon Prospective Purchaser, its officers, directors, and employees. The United States' Covenant Not to Sue in Section VIII and Contribution Protection in Section XVIII shall apply to Prospective Purchaser's officers, directors, or employees to the extent that the alleged liability of the officer, director, or employee is based on his or her status and on action taken in his or her capacity as an officer, director, or employee of Prospective Purchaser, and not to the extent that the alleged liability arose independently of the alleged liability of Prospective Purchaser. Each signatory of a Party to this Agreement represents that he or she is fully authorized to enter into the terms and conditions of this Agreement and to legally bind such Party.

27. Notwithstanding any other provisions of this Agreement, all of the rights, benefits, and obligations conferred upon Prospective Purchaser under this Agreement may be assigned or transferred to any person with the prior written consent of EPA in its sole discretion.

28. Prospective Purchaser agrees to pay the reasonable costs incurred by EPA to review any subsequent requests for consent to assign or transfer the benefits conferred by this Agreement.

29. In the event of an assignment or transfer of the Property or an assignment or transfer of an interest in the Property, the assignor or transferor shall continue to be bound by all the terms and conditions, and subject to all the benefits, of this Agreement except as EPA and the assignor or transferor agree otherwise and modify this Agreement, in writing, accordingly. Moreover, prior to or simultaneous with any assignment or transfer of the Property, the assignee or transferee must consent in writing to be bound by the terms of this Agreement including but not limited to the certification requirement in Section VII of this Agreement in order for the Covenant Not to Sue in Section VIII to be available to that party. The Covenant Not To Sue in Section VIII shall not be effective with respect to any assignees or transferees who fail to provide such written consent to EPA.

## XII. DISCLAIMER

30. This Agreement in no way constitutes a finding by EPA as to the risks to human health and the environment that may be posed by contamination at the Property nor constitutes any representation by EPA that the Property is fit for any particular purpose.

## XIII. DOCUMENT RETENTION

31. Prospective Purchaser agrees to retain and make available to EPA all business and

operating records, contracts, studies and investigations, and documents relating to conditions and operations at the Property, for at least ten years following the effective date of this Agreement unless otherwise agreed to in writing by the Parties. At the end of ten years, Prospective Purchaser shall notify EPA of the location of such documents and shall provide EPA with an opportunity to copy any documents at the expense of EPA.

#### XIV. PAYMENT OF COSTS

32. If Prospective Purchaser fails to comply with the terms of this Agreement, including, but not limited to, the provisions of Section IV (Purchase of Property from Settling Owner) of this Agreement, it shall be liable for all litigation and other enforcement costs incurred by the United States to enforce this Agreement or otherwise obtain compliance.

#### XV. NOTICES AND SUBMISSIONS

33. Whenever, under the terms of this Agreement, notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Agreement with respect to the United States, U.S. EPA, DOJ, and Prospective Purchaser, respectively.

As to the United States:

As to DOJ:

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice DJ #90-11-3-06611/1  
P.O. Box 7611  
Washington, D.C. 20044-7611

As to U.S. EPA:

Dean Ingemansen  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
1200 Sixth Avenue  
Seattle, WA 98101

Diane Norton  
Superfund Accountant  
Office of Management Programs  
Mail Stop OMP-146  
U.S. Environmental Protection Agency  
1200 Sixth Avenue  
Seattle, WA 98101

As to Prospective Purchaser:

Karen Williams  
Lane Powell Spears Lubersky LLP  
601 SW 2nd Suite 2100  
Portland, Oregon 97204

#### XVI. EFFECTIVE DATE

34. The effective date of this Agreement shall be the date upon which EPA issues written notice to Prospective Purchaser that EPA has fully executed the Agreement after review of and response to any public comments received.

#### XVII. TERMINATION

35. If any Party believes that any obligations under Section V (Notice to Successors in Interest) are no longer necessary to ensure compliance with the requirements of the Agreement, that Party may request in writing that the other Party agree to terminate the provision(s) establishing such obligations; provided, however, that the provision(s) in question shall continue in force unless and until the party requesting such termination receives written agreement from the other party to terminate such provision(s).

### XVIII. CONTRIBUTION PROTECTION

36. With regard to claims for contribution against Prospective Purchaser, the Parties hereto agree that Prospective Purchaser is entitled to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2), for matters addressed in this Agreement. The matters addressed in this Agreement are the response costs incurred or to be incurred in connection with the Existing Contamination.

37. Prospective Purchaser agrees that with respect to any suit or claim for contribution brought by it for matters related to this Agreement it will notify the United States in writing no later than 60 days prior to the initiation of such suit or claim.

38. Prospective Purchaser also agrees that with respect to any suit or claim for contribution brought against it for matters related to this Agreement it will notify in writing the United States within 10 days of service of the complaint on it.

### XIX. EXHIBITS

39. Exhibit 1 is a description of the Property which is the subject of this Agreement.

40. Exhibit 2 is a map depicting the Property.

### XX. RELEASE OF LIEN

41. Subject to the Reservation of Rights in Section IX of this Agreement, the United States agrees that the payment of \$88,500 to the U.S. EPA Hazardous Substance Superfund as set forth in Section IV (Purchase of Property from Settling Owner) will satisfy, pursuant to Section 107(l)(2) of CERCLA, 42 U.S.C. § 9607(l)(2), the United States' lien on the Property that it perfected March 3, 2000 and filed with the Multnomah County Recorder, and that any and all liens the United States holds on the Property will be thereby released and extinguished.

## XXI. PUBLIC COMMENT

42. This Agreement shall be subject to a public comment period, after which EPA may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper, or inadequate.

IT IS SO AGREED:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
BY:

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Regional Administrator  
Region 10

Date

UNITED STATES DEPARTMENT OF JUSTICE  
BY:

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Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice

Date



PORTLAND DEVELOPMENT COMMISSION  
BY:

---

Name

Date